United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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SUSAN WAGNER LEISNER, KARIN MALINOWSKI, LINDA GEDEON, CECILIA HUROWITZ, MYROSLAWA WANTO, VICTORIA PRINCIPE, MARGARET KECK MILKMAN and JANE BOOTH, individually and on behalf of all other persons similarly situated,

Plaintiffs,

- against -

NEW YORK TELEPHONE COMPANY,

Defendant.

----------x

To be Argued By:
Kenneth R. Fields

Docket No. 74-2006

REPLY BRIEF FOR APPELLANT-PETITIONER HUROWITZ

Appeal from Order of the United States District Court for the Southern District of New York

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Of Counsel

C 82 Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

74-2006

LEISNER, et al.

Plaintiff

against

NEW YORK TELEPHONE COMPANY

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss :*

The undersigned, attorney at law of the State of New York affirms: that deponent is KENNETH R. FIELDS *attorney(s) of record for* Appellant-Petitioner, Hurowitz

That on November 19 *1974 deponent served the annexed* Reply Brief for Appellant-Petitioner Hurowitz *on* HARRIET RABB, ESQ., *attorney(s) for* Respondent-Appellee, *in this action at* 435 West 116th Street, NewYork, New York 10027 *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated November 19, 1974

Kenneth R. Fields

The name signed must be printed beneath

Kenneth R. Fields

Attorney at Law

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

AFFIDAVIT OF SERVICE BY MAIL

Defendant

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on 19 *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me

The same signed must be printed beneath

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PRELIMINARY STATEMENT

It is not Appellant's purpose, in submitting this reply brief, to subject the Court to a re-argument of the propositions which have already been fully stated in Appellant's opening brief. It would not be proper to do so, nor is such a course necessary. The irreconcilable contentions of the parties are squarely presented by their respective briefs already filed. The function of this reply brief will, therefore, be strictly limited to pointing out in the briefest manner possible certain fallacies in Appellee's argument.

APPELLEE'S STATEMENT OF THE ISSUE IS ERRONEOUS

On page 1 of Appellee's brief, Appellee states that the issue before this Court is whether Cecilia Hurowitz (the Appellant herein) should have been granted more than $600 from the New York Telephone Company to compensate her for her participation in the instant action. Appellant contends that this view is not only unduly restrictive in its scope, but misstates the basic premises underlying this appeal.

Appellee, representing women who claimed that they were discriminated against because of their sex by the defendant, New York Telephone Company , brought this class action pursuant to Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000(e) et seq. for in junctive relief and damages. The litigation was concluded with an Agreement of Settlement, which Agreement was adopted as the judgment of the Court (Appendix A-16). One of the terms of the Settlement provided for the payment by defendant of $52,100 to plaintiffs and their attorney (the Appellee herein). (Appendix A-19, sub-paragraph (II (A).) It is the arbitrary and inequitable distribution of this Settlement Fund that is the heart of the instant dispute before this Court. Appellee proposed a distribution based on the "risk, burden and visibility of each named plaintiff" (Appendix A-57). The District Court "So Ordered" the distribution on that arbitrary basis. Appellant maintains that the Settlement Fund reflects an award of back pay and could not have been awarded on any other basis. Accordingly, she is asking for her proportionate share of this Fund, and likewise is asking this Court to distribute to the seven other named plaintiffs their proportionate share of the Settlement Fund on the basis of the back pay lost by each of them due to the defendant's discriminatory policies, as this is the only equitable and objective basis upon which the distribution can be made. (This point is dealt with in greater detail at page 12 of Appellant's brief.)

The second major issue involved in this appeal concerns the source of the funds from which Appellee is to get her attorneys' fees for services rendered to the named plaintiffs and the class plaintiffs. In

the District Court, attorney Rabb requested the sum of $36,300 for attorneys' fees. In deciding that this was a reasonable fee, the Court took into account the fact that not only were Appellee's efforts responsible for the creation of the $52,100 Settlement Fund, but her efforts would ultimately result in a recovery for the class plaintiffs (as opposed to the named plaintiffs) of an additional $120,960 due to the pay raises and promotions provided for in the Agreement of Settlement. Attorney Rabb termed the $120,960 sum a "conservative estimate".

It was attorney Rabb's contention in the Court below that the burden of attorneys' fees and costs should be borne entirely by the Settlement Fund, and that, therefore, the named plaintiffs in the instant action should bear the total liability for counsel fees. Under this view, the class plaintiffs need not pay their proportionate share of legal fees for the benefits bestowed on them through the efforts of counsel. The District Court sustained this view. Appellant Horowitz contends that this position is not only inequitable, but is contrary to the applicable case law. (See Point I of Appellant's brief, at page 6, for a detailed analysis of this position.) Accordingly, it is Appellant's contention that by framing the issue of this case in restrictive terms, attorney Rabb is avoiding the real issues before this Court.

ERRORS OF APPELLEE'S ARGUMENT

On page 3 of her brief, Appellee Rabb wrote:

> "The Consent Decree did not provide any relief for women who had been employed by the Company before or during the suit but who had left before its conclusion. All relief granted was for incumbent and future female employees".

Appellant contends that this statement is not true. Under the terms of the Consent Decree, the defendant company was required to pay plaintiffs and their attorneys the sum of $52,100 (Appendix A-19, 20). In return, the named plaintiffs thereby gave up all claims against the company (Appendix A-16). Nowhere in the Consent Decree does it appear that all relief was granted only for incumbent and future female employees! Assuming, arguendo, that attorney Rabb's above statement was true, it would seem that the logical thrust of her argument should have been that Appellant Hurowitz was not entitled to one cent of the Settlement Fund. Yet, she did not take this position, and Appellant contends that she did not do so because her above cited statement is simply not true. Furthermore, the weight of judicial authority holds that in a Title VII action the fact that an employee is no longer employed by the offending defendant is no bar to her standing to sue or to her standing to represent a class. Parmer v. National Cash Register Co., 5 EPD 6629 . Counsel for Appellant has yet to see a single case in which a plaintiff with standing to sue was not entitled to relief if successful.

In Point I of Appellant Hurowitz' brief (at p. 6), the Appellant takes the position that in view of the fact that the class plaintiffs will, in

the future, obtain benefits (due to pay raises and promotions) of approximately $120,960, (as per attorney Rabb's "conservative estimate"), it is equitable that they pay their proportionate share of legal fees for the benefits bestowed on them through the efforts of counsel. Appellee attacks this position as being "ludicrous". In referring to the monetary value of the Settlement (based on Appellee's estimate) to be ultimately recovered by all plaintiffs (class and named), Appellee Rabb wrote (at p. 10, footnote 5 of Appellee's brief):

> "The notion that this projection is a fixed fund or that those specific persons who will ultimately "share" in it are or could be ascertained is completely without basis in fact or logic, Appellant would have the District Court, presumably, maintain continuing daily supervision over the operations of the Telephone Company to determine which women acquiring jobs, raises, etc. are beneficiaries of the Decree and assessing each of them some portion of their salaries to pay plaintiffs' counsel fees already separately paid for by the Company".

However, when attorney Rabb presented the District Court with an affidavit to substantiate her claim for attorneys' fees, she wrote, (Appendix A-77, par. 7):

> "The consent decree obtained by plaintiffs' counsel provides for continuing jurisdiction and requires defendant to provide, for enforcement of the decree, at least 11 reports on their compliance with the various aspects of the decree and on the progress of the members of the plaintiff class. These reports will be forthcoming until 1977. I estimate that it will require approximately 40 hours spread

> out between the first report in 1973 and the last report in 1977 to read the reports, to compare the statistics and results from one period to the next, to measure if there is co mpliance with the decree, and generally to police the consent decree and insure that members of the plaintiff class receive the pr omotions, raises and training to which they are entitled". (Emphasis added).

Accordingly, it is readily apparent that Appellant is not placing the burden of daily supervision on the District Court. Attorney Rabb is already obligated to maintain whatever supervision would be required to effectuate the equitable payment of counsel fees as per Appellant's proposal in Point I of Appellant's brief. Furthermore, Appellant contends that the cases cited in Point I of her brief provide ample precedent to support the position that those who ultimately reap the benefits of counsel's efforts should pay attorneys' fees proportionate to their share of the recovery.

On page 15 of the brief for Respondent-Appellee, attorney Rabb argues that if Appellant Hurowitz deemed that the Consent Decree was unfair, she should have appealed from said Decree. In so arguing, attorney Rabb misstates the position maintained by Appellant Hurowitz throughout the course of these proceedings. Appellant has never suggested that the August 3, 1973 Agreement of Settlement (the Consent Decree) was unfair, but rather that the dis tribution of the Se ttlement Fund, proposed by attorney Rabb and so ordered by the District Court was wi thout any equitable basis. (This issue is discussed in Point I I of the Brief on behalf of

Petitioner-Appellant Hurowitz.) On page 4 of Appellant's brief, it clearly appears that Appellant is not appealing the Consent Decree, but rather the Order of distribution. With respect to said Order, Appellant's Notice of Appeal was timely filed.

In her attempt to show that Appellant Hurowitz' appeal was not timely filed, attorney Rabb cited two cases, Hecht v. Care, ____ F. Supp. _____ , 7 EPD 9049, S.D.N.Y. 1973, and Bryan v. Pittsburgh Plate Glass Co., _____ F. 2d _____ , 7 EPD 9269, 3rd Cir. 1974. Both of these cases are readily distinguishable from the instant action by virtue of the fact that in both of these cases plaintiffs were objecting to the terms of the settlement in actions brought under Title VII of the 1964 Civil Rights Act, 42 U.S.C. Sec. 2000(e), et seq. The Appellant herein is not objecting to the Agreement of Settlement, but to the distribution of the Settlement Fund created thereunder, and the source of attorneys' fees.(See Points I and II of Appellant's brief).

Appellant Hurowitz contends that the Settlement Fund reflects an award of back pay and could not have been awarded on any other basis. (This contention is discussed in Point II of Appellant's brief, and is supported by the cases cited therein.) However, attorney Rabb maintains that none of the plaintiffs in the instant action received back pay. Her position is that the distribution she proposed (and the District Court "so ordered") was arrived at "on the basis of risk, burden and visibility of each named plaintiff". (Appendix A- 57). Yet, attorney Rabb has not presented this Court with a single case that sustains the propriety of such a mode of distribution. Counsel contends that attorney Rabb's failure to

support her position with pertinent case law was not due to mere inadvertence, but rather due to the fact that there is no case law to support her arbitrary distribution. Furthermore, in the only cases cited by attorney Rabb that had not been previously cited by counsel for Appellant Hurowitz, Bryant v. Pittsburgh Plate Glass Co. and Hecht v. Care, (cited supra at p. 7), the settlement funds were to be distributed on the basis of back pay lost by women plaintiffs to the sex discrimination of the offending defendants.

APPELLEE'S CRITICISM OF APPELLANT'S AUTHORITIES IS UNFOUNDED

On page 8 (footnote 3) of the brief for Respondent-Appellee, attorney Rabb states that two of the cases cited by Appellant have been reversed. This is simply not true! City of Detroit v. Grinnel Corp., 356 F. Supp. 1380, D.C.S.D., New York, 1972, was modified by the Second Circuit at 495 F. 2d 448 (1974), but this modification did not affect that part of the District Court's opinion cited in Appellant's brief at page 7, to wit, the principle that the beneficiaries of a settlement of class actions were obliged to pay their share of the cost of litigation which resulted in recovery for them. In fact, the Second Circuit reiterated this view (at p. 469) where the Court in sustaining the equitable fund theory doctrine, said that claims for attorneys' fees" . . . may be filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group

or class of litigants."

Appellee's statement that Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator and Standard Sanitary Corp., 341 F. Supp. 1077 (D.C. Pa., 1972), has been reversed is also misleading. Appellant cited the theory enunciated by the Pennsylvania District Court that where the efforts of a claimant and his attorneys have produced a fund to be divided among all members of a particular class, claimant as the representative of the class is authorized to contract for all and to incur proper expenses of litigation, and the property produced by the efforts of such plaintiff and his attorney should bear the burden of the expenses of the attorney's services so that each member of the class who benefits will contribute his due proportion (Appellant's brief at page 7.) The Third Circuit sustained this view in its decision, 487 F. 2d 161 (1973), where the Court said (at p. 165):

> "These equitable powers may, under the equitable fund doctrine, be used to compensate individuals whose actions in commencing, pursuing or settling litigation, even if taken solely in their own name and for their own interest, benefit a class of persons not participating in the litigation".

In view of the foregoing, it is apparent that attorney Rabb's statement that the above cases have been reversed is totally unfounded.

CONCLUSION

It is respectfully submitted that the District Court Order of

distribution of March 15, 1974 (Appendix A-73) be vacated, and that the Proposal of counsel for Appellant Hurowitz (Appendix A-192 through A-197) be implemented in its stead.

Appellant reserves for oral argument any phase of Appellee's brief which has not been specifically dealt with herein.

Respectfully submitted,

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